BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNY DOUGLAS	)	
Claimant	)	
	)	
VS.	)	
	)	
AD ASTRA INFORMATION SYSTEMS, LLC.	)	
Respondent	)	Docket No. 1,034,074
	)	
AND	)	
	)	
HARTFORD INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

This matter, decided by the Kansas Workers Compensation Board (Board) in its Order of October 28, 2008, is now before the Board on remand from the Kansas Supreme Court from its February 8, 2013, Opinion. The Board heard oral argument on July 26, 2013.

Daniel Smith of Overland Park, Kansas, appeared for claimant. Jennifer M. Hill of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations as set forth in its original Order of October 28, 2008, together with the February 8, 2013, Opinion of the Kansas Supreme Court.

ISSUES

The Kansas Supreme Court concluded the Board applied the incorrect legal standard and reversed and remanded this case to the Board for further proceedings in conformance with the plain language of K.S.A. 2006 Supp. 44-508(f).

Respondent argues claimant's accident occurred during recreational activities that claimant was under no duty to attend and therefore is not compensable under the Workers Compensation Act (Act).

Claimant argues the undisputed facts in the record fail to prove either claimant was under no duty to attend the racing event or that his injury was not the result of his performance of acts as specifically instructed to be done by the employer. Claimant maintains his injury is not excluded from the Act.

The issue for the Board's review is: Does the exclusion from coverage for injuries occurring during recreational and social activities contained in K.S.A. 2006 Supp. 44-508(f) apply?

FINDINGS OF FACT

The Board adopts the factual and procedural overview set forth by the Kansas Supreme Court[1] and the Board's Findings of Fact as written in the Board's Order of October 28, 2008. This matter was originally before the Board on respondent's appeal of the June 6, 2008, Award of Administrative Law Judge (ALJ) Steven J. Howard. In its Order of October 28, 2008, the Board agreed with the ALJ and determined claimant was entitled to compensation as his accidental injury arose out of and in the course of his employment with respondent. The Board found the Act does not define recreational or social events, therefore the Board used *2 Larson's Workers' Compensation Law*, § 22.01 (2007) (*Larson's*) to assist in determining whether recreational and social activities fall within the course of an employee's employment. The Board found:

> There was, at minimum, an implied requirement or some duty to attend the event, and claimant was assigned to a team which indicates that team building was a component of the event. Moreover he was encouraged to drive fast in the race. He was paid while attending the event at a location reserved for respondent's employees. Understanding that work often entails social interaction and that the [Act] was intended to be liberally construed to bring employers and employees within its provisions, the Board finds claimant's accident did not occur during a recreational or social event as contemplated by K.S.A. 2007 Supp. 44-508(f).[2]

The Kansas Supreme Court, in its Opinion of February 8, 2013, determined the Kansas Court of Appeals and the Board erred in using *Larson's* rather than applying the plain language contained in the statute. The Supreme Court noted that statutory language must first be read giving common words their ordinary meanings. Further, the Supreme

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[1] *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 293 P.3d 723 (2013).

[2] *Douglas v. Ad Astra Information Systems, LLC*, No. 1,034,074, 2008 WL 4857924 (Kan. WCAB Oct. 28, 2008).

Court stated "if that plain reading reveals what the legislature intended, we need not resort to legal treatises to create a meaning for the statute."[3]

The Supreme Court agreed with the Court of Appeals majority that the record contains sufficient evidence to support the Board's original findings that claimant was under some duty or a conditional duty to attend respondent's event. However, the Supreme Court remanded this matter to the Board to make the requisite factual findings and apply the correct legal standard based on statutory criteria.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-508(f) states, in part:

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend **and** where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer. [Emphasis added.]

ANALYSIS

Under K.S.A. 2006 Supp. 44-508(f), an injury does not arise out of and in the course of employment if two factors exist. Both must be proven to apply the exclusion. First, the respondent must show that there was no duty for the employee to attend the recreational event. Based upon the presence of the word "and" in the statute, once the respondent proves no duty to attend, then it must also prove that the employee was either performing tasks related to his normal job or the employee was specifically instructed to participate in the activity leading to an injury. If respondent cannot show no duty to attend, it cannot satisfy the statutory burden required to obtain the exclusion.

The Supreme Court specifically found that there was, at least, some duty or a conditional duty for claimant to attend the recreational activity. Respondent failed to satisfy the burden placed upon it by the statute to prove that there was no duty for claimant to attend. This finding makes proving that claimant was performing tasks related to his normal job or that claimant was specifically instructed to participate in the activity leading to an injury moot. The analysis need go no further to conclude that the recreational or social event exclusion does not apply.

However, notwithstanding its finding that claimant had some duty to attend the recreational event, the Supreme Court has directed the Board to specifically review the

[3] 296 Kan. at 559.

evidence to determine if claimant was performing tasks related to his normal job duties when the accident occurred, or if claimant was specifically instructed by his employer to participate in the activities that led to the accident. The first question is simple to answer. Claimant was not performing tasks related to his normal job duties when the accident occurred. He was riding a go-cart, a task not related to his normal job duties.

The second question requires some analysis. The plain language of the statute indicates that claimant must be "specifically instructed" to, in this case, participate in a go-cart race. The only evidence contained in the record that would indicate that claimant was directed to climb in a go-cart and race is claimant's testimony that the company's co-owner assigned employees participating in the go-cart race to a team.

No one testified that claimant was specifically instructed to drive a go-cart. Claimant testified that he believed that Mrs. Shaver divided them into teams.[4] Claimant did not testify that he was told to participate in the race by respondent. He stated he felt like competition was encouraged, not that competition was mandated.[5] Claimant agreed that his direct supervisor did not tell him he was required to attend the recreational activity.[6]

This case is similar to the *Dickerson*[7] case where the claimant was injured at a Christmas party while participating in a sumo wrestling competition. In *Dickerson*, the claimant testified that he attended the party because it provided him the opportunity to interact with co-employees, awards were handed out, and prizes were awarded. The claimant's supervisor in *Dickerson* testified that no one was required to participate, the party was not mandatory, and there were no repercussions against any employees who elected not to attend the party.[8]

As in *Dickerson*, the record in this case does not support a finding that claimant was specifically instructed to participate in the go-cart race.

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[4] R.H. Trans. at 13.

[5] *Id*. at 16.

[6] *Id*. at 30.

[7] *Dickerson v. A-1 Appliance Plumbing, Heating & Cooling, Inc*., No. 92,730, 105 P.3d 279 (Kansas Court of Appeals unpublished opinion filed February 4, 2005).

[8] *Dickerson v. A-1 Appliance Plumbing, Heating & Cooling, Inc*., No. 1,014,645, 2004 WL 1517754 (Kan. WCAB June 25, 2004).

CONCLUSION

The exclusion of injuries occurring during recreational and social activities contained in K.S.A. 2006 Supp. 44-508(f) does not apply. Claimant had some duty to attend the social event but was not specifically directed to participate in the recreational event that led to his injury.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 6, 2008, is affirmed in all respects to the extent that it does not conflict with this order.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING OPINION

The undersigned respectfully agrees with the majority that this matter is compensable. However, the undersigned questions the necessity for the Board to revisit the issue. The Opinion of the Supreme Court affirms the Board's finding that claimant was under "some duty" to attend this recreational or social function.

K.S.A. 2006 Supp. 44-508(f) states in part:

> The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to employees while

> engaged in recreational or social events under circumstances where the employee was under no duty to attend **and** where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer. [Emphasis added.]

The Supreme Court affirmed the Board's finding that this claimant was under "some duty to attend" this function. Once that conclusion was reached, the issues dealing with the employee's normal job duties and any special instructions he may have been given by the employer become irrelevant. The conjunction "and" is a connector. Both "no duty to attend" and one of the second elements must be found for the exclusion to apply. Even if there was no duty to attend, a finding based upon either of the remaining elements would result in a finding that claimant suffered a compensable accident.

A finding of no duty to attend, but a task performed which is related to claimant's normal job duties, results in a compensable accident. Likewise, no duty to attend but a specific instruction to perform the task by the employer results in a compensable accident. Here, once the duty to attend question is determined in claimant's favor, the specific exclusionary requirements of the statute cannot be met. Once "some duty to attend" was determined, no additional findings are necessary. The matter became a compensable accident which arose out of and in the course of claimant's employment with respondent.

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BOARD MEMBER

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Steven J. Howard, Administrative Law Judge